EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

ORIGINAL

98-5021

No. 98-_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,____

MICHAEL W. RIGGS)

Petitioner,

V.

J.W. FAIRMAN JR., WARDEN;
and the attorney general

of the STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

CALIFORNIA SUPREME COURT

IN PRO PER

MICHAEL W. RIGGS C77955
S-A.T.F. STATE PRISON
P.O. BOX 7100
CORCORAN, CALIF. 93212

BY A PERSON IN STATE CUSTODY

48 pp

ORIGINAL

No. ORIGINAL

98-5021

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHAEL W. RIGGS — PETITIONER
(Your Name)

VS.

J.W. FAIRMAN JR., THE CALIFORNIA ATTORNEY GENERAL; — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[.] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s): IN THE CALIF. COURT OF APPEALS/4th Appellate DISTRICT where on Direct Appeal Counsel was appointed WITHOUT Fees OR COSTS; AND CALIFORNIA SUPREME COURT.

[X] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court. (NOT THIS CASE BY A FEDERAL COURT)

Petitioner's affidavit or declaration in support of this motion is attached hereto.

* Michael W. Riggs
(Signature)

BLE OF CONTENTS

TABLE OF AUTHORITIES

WOLFF V. MCDONELL 418 U.S. 539,558(74)

OTHER CIRCUIT CASES ARE INCLUDED AND STATE AUTHORITIES NOT LISTED HEREIN

MISC: SEE-THE U.S. SUPREME COURTS VIEW AS TO WHAT CONSTITUTES EX POST FACTO LAW [53 L.ED.2D. 1146

U.S. CONST. ART. I, SECT. 10, CL.1

U.S. CONST. AMENDMENTS 8th, 14th, U.S.C.A.

CALIF. PENAL CODES

667
667(d)
667(c)to(g)
667(e)(2)(A)(ii)
1170.12(a) to (e)
1170
1170.1
1192.7

THREE STRIKES LEGISLATION:

CALIF. ASSEMBLY BILL 971(Mar.7,1994
STATS.'94,CH.12,sect.2

PROPOSITION #184 (voter initiative
Calif. Penal code "1170.12 (a)to(e)

CALIF. CONST. ART. I

IDAHO REV. STAT. sect. 19-2514

MICHAEL W. RIGGS,
(Petitioner)

J.W. FAIRMAN JR., WARDEN; &
(Respondent(s))

MOTION AND
DECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

THE CALIFORNIA ATTORNEY GENERAL:

I, MICHAEL W. RIGGS #C-77955, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

Are you presently employed? Yes____ No XX MEDICALLY: PERMANENTLY TOTALLY DISABLED(IN CUSTODY)

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received.

ON OR ABOUT 1983 (commissions about 15,000 to 20,000 a year)

Have you received, within the past twelve months, any money from any of the following sources?

a. Business, profession or form of self-employment? Yes____ No X
b. Rent payment, interest or dividends? Yes____ NoX
c. Pensions, annuities or life insurance payments? Yes____ No X
d. Gifts or inheritances? Yes____ No X
e. Any other sources? Yes____ No X

x

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

Do you own any cash, or do you have money in a checking or saving account? Yes____ No X
(Include any funds in prison accounts)

If the answer is yes, state the total value of the items owned.

Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings)? Yes____ No XX

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE/MEDICALLY DISABLED IN CUSTODY

I, declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.

Executed on MAY 25, 1998
(Date)

Signature of Petitioner

MICHAEL W. RIGGS C77955 In Pro Per

CERTIFICATE

I certify that the Petitioner herein has the sum of $ None on account to his credit at the institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said SATF -State Prison institution:

DATED May 25, 1998

Authorized Officer of Institution

N. Cowen / C.C.I
Title of Officer

(iv)

No. 98-_____

SUPREME COURT OF THE UNITED STATES

October Term, _____

MICHAEL W. RIGGS,)
Petitioner,)
V.)
J.W. FAIRMAN JR.,WARDEN; and the CALIFORNIA ATTORNEY GENERAL:)
Respondents.)
--)

PETITION FOR WRIT OF CIRTIORARI TO THE CALIFORNIA SUPREME COURT

REASON FOR GRANTING A REVIEW

Pursuant to the United States Supreme Court Rules #17, 21.1(j), review is suggested because the postcard denial by the California Supreme Court and the state courts use of the New California Three Strikes Law is in conflict with clearly established Federal Law and/or Federal Precedent, which is of substantial interest to the Public and hundreds of similarly situated defendants each month in California.

The California Petition for Review was filed by appellate counsel JAMES L. CROWDER-Attorney under Appointment by the California Court of Appeals to the California Supreme Court on JAN 13, 1998, and Defendant/Petitioner filed a Supplemental Brief in PRO PER supplementing the CONSTITUTIONAL CHALLENGES to the "NEW" Sentencing Scheme commonly known as THREE STRIKES LAW (CAL. PENAL CODE Sections # 667 (c) to (g), and # 1170.12 (a) to (e), which was denied by a postcard "DENIAL" on FEB. 25th, 1998 without citation (EXHIBIT "A"), for which review by PETITION FOR WRIT OF CERTIORARI is sought. The citation of the opinion of the court of appeals is under appeal No.E-019488. CAL. SUPREME CT. #S-067322.

JURISDICTION

Petitioner invokes jurisdicition of the Court under 28 U.S.C. 1257(3) on the ground that his rights under the 8th, and 14th AMENDMENTS were violated and upon the grounds that state created Statuatory law provides a LIBERTY INTEREST and such 'PENDANT' Due Process Guarantees thereby applicable through the 14th amendment which was violated.

The State Courts and California Supreme Courts application of the NEW THREE STRIKES LAW (supra) is"Contrary to and an unreasonable application clearly established federal law and precedent" [28 U.S.C. "2254(d)] and violates the prohibition against EX POST FACTO LAW under U.S. CONST. ART.I, Sect.#10, Cl. #1; 8th and 14th Amendments-U.S.C.A..

QUESTIONS PRESENTED

1. IN THE NEW THREE STRIKES LAW IN C ALIFORNIA WHERE DEFENDANT IS CONVICTED OF A "NON SERIOUS" & "NON VIOLENT" PETTY THEFT OF FOOD, DID THE COURT ERR WHEN APPLYING THE 1994 THREE STRIKES LAW TO APPELLANT USING HIS PRE-1994 PRIORS TO SENTENCE HIM TO A MINIMUM 25 TO LIFE SENTENCE WHEN THAT LAW BY IT'S "EXPRESS TERMS & MEANING" CANNOT APPLY TO PRIOR STRIKES WHICH OCCURRED BEFORE THE ENACTMENT OF THE THREE STRIKES LAW; A) DOES THE COURTS USE OF PRE THREE STRIKES LAW PRIORS CONTRARY TO IT'S EXPRESS TERMS & WORDING STATE A 14th AMENDMENT DUE PROCESS (Pendant) VIOLATION;
   B) AND DOES THE COURTS USE OF PRE THREE STRIKES LAW PRIORS CONSTITUTE A SIGNIFICANT "LOSS OF LIBERTY" AS TO AMOUNT TO A VIOLATION OF THE PROHIBITION AGAINST EX-POST-FACTO LAWS UNDER THE U.S. CONSTITUTION ARTICLE I, SECT. 10, CL. 1 WITHIN THE U.S. SUPREME COURT'S VIEW AS TO WHAT CONSTITUTES EX POST FACTO LAW [53 L. ED.2D. 1146];(WEAVER V. GRAHAM 450 U.S.24; MILLER V. FLORIDA 450 U.S. 423).

QUESTION PRENTED (CONT)

2. DOES THE MINIMUM 25 to LIFE SENTENCE FOR A PETTY THEFT OF FOOD VIOLATE THE 8th MENDMENT PROHIBITION AGAINST CRUEL & UNUSUAL PUNISHMENT.

/////////

STATEMENT OF THE CASE

In a two-count amended information appellant was charged with petty theft with a prior conviction of robbery [Ct. 1, Pen. Code, § 666] and possession of a hypodermic syringe [Ct. 2, Bus. & Prof. Code, § 4149].

The amended information alleged that appellant had suffered three prior convictions within the meaning of Penal Code section 667, subdivisions (c) and (e) and Penal Code section 1170.12, subdivision (c) [prior strikes]. Four prior convictions were alleged within the meaning of Penal Code section 667.5, subdivision (b) [prior prison terms]. (CT 61-64.)[1]

Trial was by jury, with the trial of the prior conviction allegations being bifurcated from the trial of the substantive offenses. (CT 196, RT 80.) The jury returned its verdicts finding appellant guilty of the substantive offenses. (CT 205-206.) Trial of the prior conviction allegations was by the court and the court found the allegations to be true. (CT 2449A-250.)

At sentencing, an indeterminate sentence of 25 years to life was imposed for Count 1. A 90 day county jail sentence was imposed for Count 2 to be served concurrently. The three prior prison term enhancements were stricken. The trial court credited appellant with 411 days for actual presentence custody and with 61 days of presentence custody conduct credits. (CT 325.)

Appellant thereafter filed a timely notice of appeal. (CT 327.)

[1]As used herein "CT" shall denote the Clerk's Transcript, and "RT," shall denote the Reporter's Transcript on appeal.

2/ As of NOV. 14. 1997, the California Department of Corrections issued a MEMO to all CLASSIFICATION COMMITTEES & PRISON WARDENS (EXHIBIT-B) that all THIRD STRIKE DEFENDANTS-inmates will be on ZERO CREDIT RULE per PPL. V. STOFLE (1996) 45 Cal. App. 417, and will serve a MINIMUM of 25 years before parole board eligibility review hearing.

STATEMENT OF FACTS

On October 13, 1995, at approximately 5:10 p.m., at an Albertsons Store located in Banning an employee, Anne Lopez, was working in one of the aisles. She noticed appellant standing in the vitamin section. She saw appellant take a bottle from an "Energy Pill" display and place it in his left front jacket pocket. The employee suspected that appellant was going to steal the bottle of vitamins, so she continued to watch him. She followed him as he walked away from the aisle towards the check stands, past the check stand entrances, around to the video rental racks and past the photo department and then out the store exit without paying or attempting to pay for the vitamins. (RT 123-129.)

Lopez notified Randy Evans, another employee, and the two of them followed appellant outside the store. When they caught up to appellant, Lopez said, "Excuse me, can we have the pills?" Appellant did not respond and kept walking. Lopez asked him to return the pills several times. After the third request, appellant turned around, looked at her and then turned away and began running. (RT 129-130.)

By this time several other store employees had come outside. Several of the male employees chased appellant across the parking lot. At one point the appellant stopped and turned to face an employee, Carl Ortega. Appellant told Ortega that he had a knife, and swung his right hand at Ortega as if holding a knife.

Ortega stepped back, then saw there was no knife in appellant's hand. Appellant started running and Ortega again gave chase. Just before Ortega and another employee caught appellant, he threw the bottle of vitamins onto the ground. (RT 185-195.)

After a struggle, appellant was detained and brought back into the store. Banning Police Officers responded to the store to take custody of appellant. They searched him and found a hypodermic syringe hidden in his left sock. (RT 195-196, 234-239.)

ARGUMENT

I.

THE TRIAL COURT ERRED WHEN APPLYING THE 1994 "THREE STRIKES" LAW TO APPELLANT'S PRE-1994 PRIORS AND TO APPELLANT'S SENTENCE OF 25 TO LIFE BECAUSE THAT LAW PASSED BY VOTERS, BY IT'S EXPRESS *7) TERMS & ORDINARY MEANING, DOES NOT & CANNOT APPLY TO PRIOR STRIKES WHICH OCCURRED BEFORE THE ENACTMENT OF THE THREE STRIKES LAW; AND THE COURTS USE OF PRE-1994 PRIORS IN CONTRAVENTION TO THIS "EXPRESS WORDING" OF THE STATUTE CREATES A 'PENDANT' 14th AMENDMENT DUE PROCESS VIOLATION, AND VIOLATES THE PROHIBITION AGAINST "EX-POST FACTO LAW" (U.S. CONT.ART.I, §10, Cl.#1):

The Trial court applied the 1994 voter-approved "THREE STRIKES" Law *3 TO Appellant' PRE-1994 Priors out of a SINGLE Case (# A577867) TO Sentence Appellant to a minimum term of "25 to LIFE" sentence. .(Supra- Pg. 4, ¶t. 2, (P.C.§ 667, subd.(e)(2)(A)(ii).) Appellant's case ostensibly fell under the three strikes law because he had suffered two SERIOUS PRIOR felony conviction in 1992.(see:Ca.Penal Code §§ 667(d)(1) and § 1192.7(c)(19).)

Section 667, subd.(d) governs whether a prior conviction is a strike for the purposes of the Three Strikes Law. *4 That subdivision provides in relevant part:

> "Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as:
> (1)-Any offense defined in subdivision (c) of Section § 667.5 as a violent felony or any offense defined in subdivision (c) of Section § 1192.7 as a serious felony in this state. The determination of whether a prior conviction is a prior felony conviction for purposes of section (b) to (i) , inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts to a misdemeanor..."(Emphasis added).

FN: * 3 Appellant is aware that on JUNE 30, 1995, the Court of Appeal issued it's decision in Ppl. v. Sipe (1995) 36 Cal.App. 4th 468, rejecting this arguement, as well as other challenges raised to the sentencing scheme known as Three Strikes Law. (also:Ppl. v. Green (1995) 36 Cal.App. 4th 280). Nevertheless, since the VOTERS approved the EXPRESS WORDING this brings a PENDANT 14th-Amendment DUE PROCESS Guarantee (USCA), and Federal EX POST FACTO questions into these considerations for further review, both State and Federal due to the unsettled state of the new law.

*4 In the interests of brevity appellant will use the term "three Strikes Law" when reffering to Ca.Assembly Bill #971 which changed the way sentences were computed for felons with one or two prior convictions for violent or serious felonies. effective on March 7, 1994.(Stats.'94,Ch. 12,§ 2.). It is codified in...

Appellant submits that under the plain-common sense-ordinary & express wording and meaning of language from Penal Code § 667(d), emphasized above, a prior conviction does not qualify as a strike for purposes of invoking the three strikes law unless, on the date the prior conviction is entered, the judge or the jury makes a determination that the conviction will qualify as a strike, thus giving defendant adequate notice. The three strikes law thus cannot apply to appellant in contravention to this EXPRESS WORDING or 'pendant' Federal Due Process (14th Amendment) and the U.S. Constitutions prohibition against EX-POST-FACTO law is violated:(U.S.CONST. ART.I, § 10, Cl.#1) within the meaning of WEAVER V. GRAHAM 450 U.S. 24, and MILLER V. FLORIDA 450 U.S. 423. (THE U.S. SUPREME COURTS view as to what constitutes EX POST FACTO law/*see: 53 L.Ed. 2D. 1146).)

Appellant's two-prior strikes *5 predated MARCH 7, 1994, and no determination was made in this ~~1989~~ Case No.A-577867, that these convictions were "A prior felony conviction for purposes of subdivions (b) to (i)." (P.C. § 667(d)(1).).

It is axiomatic that a court's primary task when construing a statute is to determine the lawmakers intent,(Ppl. v. Jones(1993) 5 Cal. 4th 1142,1146), or the common sense meaning when approved by voter initiative. To determine that intent, courts turn first to the statutes words themselves. (Ibid.) Significance should be attributed to every phrase of a statute, and a construction making

... Ca.Penal Code §667. With the enactment of Ca. voter initiative PROP.#184 in the November, 1994 election, provisions identical to the three strikes law now are found in a new statutory section, namely section § 1170.12. (Compare section § 667(c) to (g) with section § 1170.12(a) to (e).).

*5 Appellant will use the term "PRIOR STRIKES" when referring to those prior convictions which trigger the application of the three strikes law.

some words surplusage is to be avoided.(Ppl. v. Woodhead (1987) 43 Cal.3d. 1002,1010.). If the language is clear and unambiguous there is no need for construction of a statute. (Ppl. v. Jones, supra, 5 Cal. 4th at p. 1146)"Clear statutory language no more needs to be interpreted than pure water needs to be strained," (Holder v. Superior Court (1969) 269 Cal. App. 2d. 314,317.) Courts decline to follow the plain meaning of a staute "only when it would inevitably have frustrated the manifest purpose of the legislation as a whole or led to absurd results." (People v. Bellici (1979) 24 Cal. 3d. 879, 884.).

A) BOTH THE STATE AND FEDERAL LAW HAS HELD THAT A STATE's EXPRESS STATUATORY LANGUAGE MAY CREATE A "PENDANT" FEDERAL DUE PROCESS GUARANTEE AND LIBERTY INTEREST:

The DUE PROCESS Clauses (U.S. CONST. AMENDS.V, XIV) are designed to protect the individual against arbitrary government action.(WOLFF V. MCDONELL 418 U.S. 539, 558 (1974)(citing: Dent v. West Virginia 129 U.S. 114, 123 (1889). The threshhold question in any Due Process Claim is whether a protected Liberty or Property Interest is involved. MEACHUM V. FANO 427 U.S. 215, 223-24 (1976). LIBERTY INTERESTS may be created by a statute,(BOARD OF PARDONS v.ALLEN 482 U.S. 369,376-81 (1987),HEWITT V. HELMS 459 U.S. 460, 471-72 (1983)), a court order, SMITH V. SUMNER 994 F.2d. 1401,1406 (9th Cir.1993), regualation, (HEWITT-supra), In determining a Pendant Due Process Claim the Courts traditionally require that the statute or regualation contain substantive predicates and look to the EXPRESS-MANDATORY LANGUAGE governing the outcome (BERGIN V. SPAULDING 881 F,2D. 719,722 (9th 1989), ZARNES V. RHODES 64 F.3d. 285, 292. Once an INTEREST has been classified as protected, a court must balance "the private interests at stake, ...the governmental interests involved, and...

... the value of procedural requirements in determining what process is due under the Fourteenth Amendment."(HARPER 494 U.S. at 229 (quoting HEWITT 459 U.S. AT 473).

B). STATES EXPRESS LANGUAGE & GOVERNMENTAL INTERESTS :

Appellant submits that the express language of the relevant prtion of subdivision (d) is plain*6. That language provides: "The determination of whether a prior conviction is a prior conviction for purpose of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction...". When appellant was convicted of two serious felonies in 1989 out of a single case,(A-577867), subdivisions (b) to (i) of § 667 had not yet been enacted. It was impossible for the jury or the court to make a determination that the convictions would be a "SERIOUS" or "VIOLENT" prior conviction(s) for the purposes of being STRIKES within the meaning of subdivisions (b) to (i) of §667, since the three strikes law was enacted 5- years later(1994).

1) THE THREE STRIKES LAW OPERATES PROSPECTIVELY NOT RETROACTIVELY:

When a prosecutor seeks to use a California conviction for an offense listed in Penal Code § 667.5(c)(violent felonies) or in § 1192.7(serious felonies) as a prior, there must have been a determination that it was a prior for purposes of the "three strikes" measure on the date the conviction occured. Giving the language any other meaning requires us to rewrite the words used by the legislature and the voter initiative. The first principle of statuatory construction is that words must be given their plain, ordinary meaning [See:People v. Morris (1988) 46 Cal.3d.1,15]. As the California recently stated in DELANEY V. SUPERIOR COURT[(1990) 50 Cal.3d.785,804]

*6) The term "SUBDIVISION (d)" refers to subdivision(d) of P.C.§66

"It is bedrock law that if the lawmaker gives us an express definition, we must take it as we find it..." [DELANEY-Supra].

And further JUSTICE EDWARD PANELLI recently made theis point quite tellingly: "In my view, the majority is not warranted in invoking the maxim of 'absurdity' to justify ignoring explicit statutory language, even if it does so to achieve what it percieves to be a superior result. Instead, the unambiguous statutory language chosen by the legislature should be given effect".[People v. Broussard (1993) 5 Cal.4th 1067,1080-(PANELLI J.-Dissenting)]. *11

It might be argued that the above quoted language from subd.(d), means that the court sentencing the defendant for the post-March 7th, 1994 , offense shall determine whether a prior is a strike by analyzing the state of affairs on the date of the prior conviction. That, however, is not what subdivision (d) says. Subdivision (d) says that the 'determination' of whether a prior qualifies 'shall be made upon the date of the prior conviction" It does not state that the determination shall be made during the proceedings in a later case by looking back in time to the state of affairs on the date of the prior conviction. The legislature obviously assumed that other recidevist enchancements of one year and five year priors under then existing P.C.§ 667(à) and (b) would be used and "CALLING" the strikes as they happened would be a deterence by giving defendant notice.

These questions may arise as to why the Legislature wanted a finding as to the qualifying nature of the conviction at the time the conviction occurred. There are three obvious purposes for such intent of statuatory construction.

The first would be to obviate the extensive litigation of priors, which has sprung from other statutes that, while dealing with PRIOR CONVICTIONS...

*11) See "EXH.-omitted /arguement by GERALD F. UELMEN entitled: "THREE 'CALLED' STRIKES AND YOU'RE OUT"; Gerald F. Uelman is CHAIR of the Executive Committee of the Criminal Law section of the State Bar of California; Dean of Santa Clara University School of Law; has served as PRESIDENT of both Calif. Academy of appellate Lawyers and Calif. attorneys for Crim. Justice.

omitted → concurring opinion

did not contain a mandatory requirement that the qualifying nature of the prior be determined at the date of conviction. *7 Not only has this litigation been extensive, it even has led to contrary opinions by the Supreme Court in two cases decided within 16 months of each other. (See People v. Guerrero (1988) 44 Cal.3d 343, overruling People v. Alfaro (1986) 42 Cal.3d 627.) Subdivision (d) wisely obviates a great deal of similar litigation. Indeed, subdivision (d), as construed by appellant, avoids the precise problem inherent in the Guerrero/Alfaro situation, i.e., how to determine whether a prior conviction entered before the enactment of a priors statute comes within the provisions of that later-enacted statute.

A second purpose would be to obviate challenges to convictions that occurred prior to March 7, 1994, on the ground that the defendant would have used different tactics and may well have obtained different results if he knew the case might result in a strike. To illustrate, take a multi-count information filed against a first time offender in 1989 charging some offenses which are violent felonies under section 667.5, subdivision (c) and some which are not. In plea negotiations there was no strong incentive to plead guilty to a nonviolent felony rather than a violent one. This is because no one knew that nine years in the future a conviction for a violent

*7) Because the Court is aware from its own case load of the large number of cases raising issues about whether priors qualify for enhancement, appellant will not include the serpentine string cite which supports his statement. He will, however, favor the Court with a chronological list of some Supreme Court cases which discuss retrospective determinations of the status of a prior conviction. (People v. Jackson (1985) 37 Cal.3d 826; People v. Thomas (1986) 41 Cal.3d 837; People v. Equarte (1986) 42 Cal.3d 456; People v. Piper (1986) 42 Cal.3d 471; People v. Alfaro, supra, 42 Cal.3d 627; People v. Calio (1986) 42 Cal.3d 639; People v. Guerrero, supra, 44 Cal 3d 343; People v. Myers (1993) 5 Cal.4th 1193.)

felony would be a strike. However, similarly situated first time offenders facing charges from crimes committed after March 7, 1994, can take the three strikes law into consideration when negotiating a plea.[8] There is no compelling nor rational reason for treating similarly situated first-time offenders differently simply because one offender negotiated a plea bargain aware of the harsh possible consequences of the plea and the other offender had no knowledge of these potentially harsh consequences. The language of subdivision (d) here in issue has the effect of giving equal treatment to all offenders.

A third purpose of the plain language of subdivision (d) is that it allows defendants to be deterred by the specter of enormously increased sentences for new offenses while allowing the state time to build new prisons to incarcerate three strike offenders and to prepare financially for the substantial increase in costs inherent in the longer three strike sentences.

It is significant to note that subdivision (d) is not the first time the Legislature has addressed a question related to the contemporaneous determination of the nature of a conviction for purposes of later use as a prior. Case law interpreting the pre-three strikes version of section 667 consistently held that the determination of whether a conviction qualified as a serious felony was not to be made at the time of conviction but instead was to be made at a later time when the conviction was actually alleged as a prior. (People v. Sanchez (1991) 230 Cal.App.3d 768, 772-773; People v. Bovajian (1991) 228 Cal.App.3d 771, 774-775; People v. Ybarra (1988)

---

*8) There are some restrictions on plea bargaining when a defendant has suffered prior strikes (see section 667, subd. (g)). These restrictions do not apply to first time offenders facing charges for offenses which can result in a strike.

206 Cal.App.3d 546, 549-550.) In 1991 the Legislature effectively abrogated this case law by enacting section 969f. That section provides that when the defendant has committed a serious felony, the accusatory pleading "may" charge it as such. Section 969f has the effect of avoiding later litigation over the serious nature of a prior by allowing the prosecutor to charge a pending crime as a serious prior. Section 667, subdivision (d), takes the matter one step further by requiring (rather than simply allowing) a determination about an offense's nature at the time it is tried, thus obviating the need for any future litigation on the issue.

Thus this court need not fear that it will twist the Legislature's intent if it construes subdivision (d) literally. The literal language of subdivision (d) reflects a considered decision that a contemporaneous determination of a conviction's status is better than a retrospective one and is less likely to lead to later litigation. The Legislature meant precisely what it said in subdivision (d).

While it might be argued that while the plain language of subdivision (d) requires a determination of an offense's nature at the time of conviction, that plain language should not be followed because it inevitably frustrates the manifest purpose of the legislation. (See People v. Bellici, supra, 24 Cal.3d at p. 884.) The purpose of the three strikes law is to "ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and or violent felony offenses." (Section 667, subd. (b).) However, applying subdivision (d) in accordance with its plain language does not "inevitably" (People v. Bellici, supra, 24 Cal.3d at p. 884) frustrate this purpose. The plain language of subdivision (d) delays application of the law to people like appellant. As long as the preconditions of subdivision (d) have been met, longer punishment is

insured.*9

It is worth noting the supreme court's observation that "courts must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature." (People v. Weidert (1985) 39 Cal.3d 836, 843, citation and internal quotation marks omitted.) The language in subdivision (d) not only is plain, it also is based on sound considerations of policy and fairness and does not inevitably frustrate the purpose of the three strikes law. Accordingly, that plain language must be followed.

To summarize, subdivision (d) expressly provides that the provisions of section 667, subdivisions (b) to (i), apply only where there has been a determination on the date of the prior conviction that the conviction qualifies for use in subdivisions (b) to (i). The record is devoid of any evidence showing that determinations were made in 1989, to the effect that the convictions would be for purposes of subdivisions (b) to (i) of section 667. Accordingly, the trial court erred when it sentenced appellant under the provisions of the three strikes law, and the matter should be remanded for resentencing. The new sentencing should be pursuant to sections 1170 and 1170.1, and not under the three strikes law. *9

2). FOLLOWING THE EXPRESS STATUATORY LANGUAGE PROVIDES NOTICE AND THUS WOULD COMPLY WITH FUNDAMENTAL FEDERAL DUE PROCESS

It is a fundamental precept of due process of law that an accused must have prior notice of the acts constituting a criminal violation. A recidivist must be given specific notice of the manner in which committing a new felony would result in a Significant Loss of Liberty-supara.

*9)*Again the legislature assumed that under then existing law effective on the dates of the priors making 1 year and 5 year enhancements under P.C. 667 & 667.5 would continue to be used in (16) recideivist enhancement sentencing proceedings.

C). THE CALIFORNIA THREE STRIKES LAW AS APPLIED TO DEFENDANTS SENTENCE OF"25 TO LIFE" AMOUNTS TO A "SIGNIFICANT LIBERTY INTEREST OR LOSS" FOR PRE-THREE STRIKES LAW PRIORS AND IT CONSTITUTES A VIOLATION THE PROHIBITION AGAINST EX-POST-FACTO LAWS UNDER THE U.S. CONST. ART. I, Sect.#10, CL. #1 WITHIN THE MEANING OF WEAVER V. GRAHAM 450 U.S. 24 and MILLER V. FLORIDA (87) 482 U.S. 423, by THE U.S. SUPREME COURTS VIEW AS TO WHAT CONSTITUTES EX-POST-FACTO LAW[53 L.ED.2D.1146]:

THE EXPRESS WORDING also supports the determination that the California Legislature realized that this statute was beyond being a normal recidivist statute where a defendant might recieve a 1 year enhancement for prior prison terms(PC §667 (a) and § 1192.7(c), of 5 years enhancement (P.C.§667(a)(1). It not merely a DOUBLE or TRIPLE the normal sentence for the crime in this case for recidivism. Appellants sentence is 25 to LIFE, a "SIGNIFICANT LIBERTY INTEREST OR LOSS" only topped by the DEATH PENALTY. Appellant submits that this falls within the U.S. SUPREME COURT'S VIEW as to what constitutes EX-POST-FACTO Law (53 L.Ed.2d.1146] and within the meaning of the "WEAVER"-supra standard and "MILLER"-supra.

The California Legislatures EXPRESS wording shows an intent and knwlege that this statute was not intended to violate the prohibition against Ex-Post-Facto Law, because it constitutes just such a maximum and significant"LIBERTY INTEREST OR LOSS." The legislature took into account this possible litigation explosion and sought to eliminate the EX POST FACTO challenge by stating EXPRESSLY in P.C.§667(d):"The determination of whether a prior conviction is a prior felony conviction for purposes of (A STRIKE) section (b) to (i),...shall be made upon the date of that conviction'.

An Ex-Post-Facto Law is one if applied retroactively would cause a"SIGNIFICANT LIBERTY INTEREST OR LOSS".

Defendants New case involved TWO COUNTS, and with his TWO (1989) SERIOUS PRIORS out of a single case, he was given a (1994) THREE STRIKES LAW "25 to LIFE" sentence FOR a PETTY THEFT of food, which could be a misdameanor carrying less than a year in County Jail, or 16 months, 2 , or 3 years if charged as a felony.

Therefore, appellant asserts that this is an EX POST FACTO LAW being used without NOTICE retroactively, contrary to legislative intent and express wording, on priors before the enactment of the 1994 Three Strikes Law(*Pg. 4 and 8-footnote #5-SUPRA), because it involves a "Significant Loss of Liberty" only less than the Death Peanlty, and therefore wrongfully applied to this appellants case.

Therefore, the application of this law to defendant/appellant violates the prohibition against EX POST FACTO LAW under the U.S. CONSTITUTION ARTICLE I,§ 10, Clause #1 and that the 14th Amendment is violated as alleged herein.

Applying this law retroactively contrary to the EXPRESS wording of the Statute amounts to a "Pendant" claim of a violation under the FOURTEENTH AMENDMENT'S DUE PROCESS GUARANTEES.

ARGUMENT

II.

APPELLANT'S LIFE SENTENCE FOR THE OFFENSE OF PETTY THEFT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER BOTH THE CALIFORNIA AND FEDERAL CONSTITUTIONS

"'The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings." [Citation.] Punishment which is so excessive as to transgress those limits and deny that worth cannot be tolerated." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) A sentence that is "grossly disproportionate" to the offense for which it is imposed, violates both the California and United States constitutional prohibitions against cruel and unusual punishment. (*People* v. *Dillon* (1983) 34 Cal.3d 441, 478; *Gregg* v. *Georgia* (1976) 428 U.S. 153, 173; *Coker* v. *Georgia* (1977) 433 U.S. 584; U.S. Const., 8th Amend.; Cal. Const., art. I, Pen. Code, § 17.) *10

In *Lynch*, this Court set forth three techniques for evaluating a punishment to determine whether it is disproportionate. The court must (1) examine the nature of

*10 The federal circuit courts continue to apply a gross disproportionality test in determining Eighth Amendment challenges to punishments imposed for non-capital offenses. (See, e.g., *Cacoperdo* v. *Demosthenes* (9th Cir. 1994) 37 F.3d 504, 507-508; *United States* v. *Munoz* (1st Cir. 1994) 36 F.3d 1229, 1239; *United States* v. *Cupa-Guilen* (9th Cir. 1994) 34 F.3d 86, 864-865; *United States* v. *Lanier* (6th Cir. 1994) 33 F.3d 639, 665; *United States* v. *Frieberger* (8th Cir. 1994) 28 F.3d 916, 920; *United States* v. *Fisher* (5th Cir. 1994) 22 F.3d 574, 579-580; *United States* v. *Angulo-Lopez* (10th Cir. 1993) 7 F.3d 1506, 1510; *United States* v. *Sarbello* (3d Cir. 1993) 985 F.2d 716, 724; *McGruder* v. *Puckett* (5th Cir. 1992) 954 F.2d 313, 316-317.)

the offense and/or the offender, (2) compare the challenged penalty with punishment prescribed in California for other, more-serious offenses, and (3) compare the challenged penalty with punishments prescribed for the same offense in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at p. 425-427.)

For a holding of disproportionality, the court need not find the punishment disproportionate in all three respects. Rather, a finding of disproportionality based upon any of the *Lynch* criteria will suffice. (*People* v. *Dillon*, *supra*, 34 Cal.3d 441, 487 fn. 38; *In re Rodriguez* (1975) 14 Cal.3d 639, 656.) This does not mean, however, that each of the techniques must be considered in total isolation from the others. When the Court stated, in *Lynch*, that a statute's disparity with punishments in other states "is a *further* measure of its excessiveness" (*In re Lynch*, *supra*, 8 Cal.3d at p. 427, emphasis added), the suggestion is that the measure of disproportionality found in applying the several techniques would be cumulative.

A. <u>The penalty is disproportionate as applied to this offense and this offender</u>.

In *People* v. *Dillon*, *supra*, 34 Cal.3d 441, this Court found that, under the facts of its case, strict application of the felony-murder rule violated the prohibition against cruel and unusual punishment. In reaching this result, the Court looked to "'the nature of

the offense and/or the offender, *with particular regard to the degree of danger both present to society.*'" (*Id.*, at p. 479, emphasis added, quoting *In re Lynch*, *supra*, 8 Cal.3d at p. 425.)

With regard to the "nature of the offense," courts are to consider "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his act." (*People* v. *Dillon*, *supra*, 34 Cal.3d at p. 479.) As for the "nature of the offender," the appropriate inquiry is "whether the punishment is grossly disproportionate to defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

Proper application of this analysis to the present case reveals that appellant's life sentence is "grossly disproportionate" both to the severity of his crime, and to the degree of danger he poses to society. In the present case, appellant was convicted of petty theft. Yet, appellant has been subjected to a life sentence for this offense. Such an offense is neither a violent nor a serious felony. (§§ 667.5, subd. (c), 1192.7, subd. (c).)

Petty theft is not among those offenses considered most dangerous to society. It is neither serious nor violent. An examination of the "totality of the circumstances surrounding the commission of the offense"

also underscores the nonserious, nonviolent nature of the offense.

While appellant's prior felony convictions arguably support some increased punishment for the current offense, the extreme punishment imposed cannot be rationalized under any credible system of criminal justice. (Cf. *In re Lynch*, *supra*, 8 Cal.3d at p. 425; *Faulkner* v. *State* (Alaska 1968) 445 P.2d 815, 818-819 [holding unconstitutionally disproportionate a 36-year sentence imposed on a 46-year-old man with a prior criminal record for a single spree of passing bad checks in one single day].)

B. The penalty is disproportionate when compared with punishment prescribed in California for more serious offenses.

In the present case, the Legislature has already determined that a conviction under Penal Code section 666 is not among the state's serious or violent felonies. (See §§ 667.5, subd. (b), 1192.7, subd. (c).) Under the Three Strikes Law, appellant is not eligible for parole until he serves 20.8 years, i.e., 80% of 26 years.*11 (§ 667, subd. (c)(5).) By contrast, someone who commits a cold-blooded premeditated murder with a deadly weapon receives a maximum sentence of 26 years to life (§§ 190, subd. (a), and 12022, subd. (b)), and is eligible for parole in 17 years 4 months. (*In re Oluwa* (1989) 207 Cal.App.3d 439, 444-447.)

The question then becomes whether it is cruel or unusual to impose a sentence of 26 years to life without parole eligibility for 20.8 years in this case for having committed a petty theft. There is no doubt that the answer is yes. A person who commits premeditated murder with a deadly weapon is eligible for parole for that offense three years and 10 months sooner than appellant will be for this offense. Under no principled or defensible analysis can appellant be viewed as having posed a greater danger to society than such a murderer. As stated in *Dillon*, "a comparison of the challenged penalty with those prescribed in the same jurisdiction for more-serious crimes . . . is

*11) NT: CDC HAS JUST ENACTED A "NO CREDIT" EARNING STATUS FOR 3RD STRIKE DEFENDANTS WHO WILL SERVE A MINIMUM 25 YEARS OF A 25 TO LIFE SENTENCE PER PEOPLE V. STOFLE (96) 45 CAL. 4TH 417

particularly striking when a more serious crime is punished less severely than the offense in question, ..." (*People* v. *Dillon*, *supra*, 34 Cal.3d at p. 487, fn. 38 [emphasis omitted]; *In re Foss* (1974) 10 Cal.3d 910, 925-926.)

Application of the Three Strikes Law to persons convicted of relatively minor felonies only widens the disparity. Some trial courts have declined to apply the Three Strikes Law at all to third strikers convicted of such offenses and other felonies which have the option of being treated as misdemeanors under the provisions of section 17. (See, e.g., *People* v. *Trausch* (1995) 36 Cal.App.4th 1239, [trial court elected to reduce burglary involving theft of a cake to a misdemeanor, in order to avoid 25 years to life sentence otherwise mandated for third strike defendant; ruling affirmed on appeal], and *People* v. *Vessell* (1995) 36 Cal.App. 285 [trial court reduced the offense of inflicting corporal injury upon a cohabiting person to a misdemeanor and granted probation].)

C. The penalty is disproportionate when compared with recidivist punishments in other jurisdictions.

Some states' recidivist statutes, which appear on their face to be as draconian as California's, in actual practice, are not enforced as rigidly as is California's. In Idaho, a third conviction of any felony requires a prison term of not less than five years, and the term may extend to

life. (Idaho C[redacted] § 19-2514.) However, [redacted]t statute differs from California's because the Idaho sentencing courts have wide discretion within those bounds (*State* v. *McPhie* (1983) 104 Idaho 652 [662 P.2d 233, 237]; *State* v. *Gauna* (1989) 117 Idaho 83 [785 P.2d 647, 652-653]), whereas the California sentencing courts have no function but to mathematically compute the defendant's sentence. More important, application of the recidivist statute is not mandatory; the Idaho court can sentence the defendant for the last-committed crime only, notwithstanding the prior record. (*State* v. *Holton* (App. 1991) 120 Idaho 112 [813 P.2d 923, 924].) Further, unlike the California statute, under which consecutive sentences are mandatory (Pen. Code, § 667, subd. (c)(6)-(8)), the Idaho courts retain discretion to sentence either consecutively or concurrently. (*State* v. *Brandt* (App. 1986) 110 Idaho 341 [715 P.2d 1011, 1016].) Finally, whereas 100 percent of the California minimum sentence must be served, an Idaho defendant may be considered for parole after service of one-third of the sentence. (*State* v. *Harrison* (App. 1985) 108 Idaho 324 [699 P.2d 30, 31].)

PRAYER FOR RELIEF

WHEREFORE, MICHAEL W. RIGGS, IN PRO PER, BY A PERSON IN STATE CUSTODY PRAYS THAT THIS COURT WILL GRANT CIRTIORARI REVIEW OF THE ISSUES PRESENTED HEREIN REGAUARDING THE NEW CALIFORNIA THREE STRIKES LAW ANED SENTENCE RENBERED: AND ANY RELIEF DEEMED JUST AND PROPER!

RESPECTFULLY SUBMITTED: Michael W. Riggs

,MICHAEL W. RIGGS #c-77955
PRO SE PETITIONER

BY A PERSON IN STATE CUSTODY

Fourth Appellate District, Division Two, No. E019488
S067322

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

MICHAEL WAYNE RIGGS, Appellant

Appellant's petition for review DENIED.

GEORGE

Chief Justice

App. Exh. (A)

FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

12-17-97

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL WAYNE RIGGS, Defendant and Appellant.	E019488✓ (Super.Ct.No. CR66167) OPINION

APPEAL from the Superior Court of Riverside County. Dennis McConaghy, Judge. (Judge of the Municipal Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

James L. Crowder, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster, Supervising Deputy Attorney General, and Craig S. Nelson, Deputy Attorney General, for Plaintiff and Respondent.

EXH. (A)

A jury found defendant guilty of petty theft with a prior (Pen. Code, § 666)[1] and possession of a hypodermic syringe (Bus. & Prof. Code, § 4149). The court found true four allegations that defendant had served prior prison terms within the meaning of section 667.5, subdivision (b) and four allegations that defendant had received serious and/or violent felony convictions under section 667, subdivisions (c) and (e) and section 1170.12, subdivision (c). The court sentenced defendant to 25 years to life for the petty theft with a prior conviction and to a concurrent 90-day term in county jail for count 2. The court struck the prior prison term enhancements. The court gave defendant credit of 411 days for actual presentence custody but limited presentence conduct credits to 61 days under section 2933.1.

On appeal, defendant contends that the prosecutor committed prejudicial misconduct in his closing argument to the jury, defendant's life sentence constitutes cruel and unusual punishment under both the California and federal Constitutions and the trial court erred in determining presentence conduct credits. We affirm the judgment but order it amended to reflect the correct amount of presentence conduct credits.

FACTS

Ann Lopez, an employee of Albertsons Supermarket in Banning, was working in one of the aisles when she noticed defendant standing in the vitamin section. Lopez saw defendant take a bottle of vitamins from a display and place it in his jacket pocket. As

---

1 All further statutory references will be to the Penal Code unless otherwise indicated.

Lopez watched him, defendant walked out of the store without paying for the vitamins. Lopez notified another employee who accompanied Lopez as she followed defendant out the store. Lopez asked defendant to return the vitamins, but defendant did not respond and kept walking. Defendant eventually turned and looked at Lopez and began running away. Several other male employees chased defendant across the parking lot. At one point, defendant stopped and faced an employee. He told the employee that he had a knife and swung his right hand as if he had a knife. The employee realized there was no knife in defendant's hand, and defendant continued running. Just before several employees caught defendant, he threw the bottle of vitamins onto the ground. Defendant asked the employees if he could work for the merchandise. As police were searching defendant, they found a hypodermic syringe in his sock.

DISCUSSION

I

Prosecutorial Misconduct

Defendant contends that the prosecutor committed prejudicial error during his closing argument to the jury. On appeal, defendant objects to the following statements by the prosecutor: "Why are we here? Why does a person fight a traffic ticket? Well, he may fight it because he doesn't believe he is guilty. He may also fight it because he thinks the fine is too high, because he thinks he will get a reduction or some leniency if he pushes it to the maximum. I disagree with that law. There is no way I'm going to pay that ticket. These are things you can't speculate on. The prosecutor must think he has a

(30)

good case, that's why he pushed it this far. Or the defendant thinks he has a good case, that is why he pushed it this far. That is not something for you to speculate about."

Defendant also objects to the continuing comments: "Well, those are the two duties that you are here to perform, and you know we're here today if you think about it because Mr. Riggs just kept on pushing, you know, he just kept on pushing. He was asked -- first, he goes into the store where people are running a business trying to make a living. Young people, you know, making an hourly wage. It is not as if they're there to risk their life for [a] $20 bottle of pills. And when he steals it and he walks out of the store he pushes them. They say, just come back, we don't want to get involved in this, but he keeps pushing them. I'm going to violate the law, and I bet you if I push this envelope far enough you guys are going to let me go.

"So what does he do? He runs and they chase him. So he says he has a knife and he spins around like he is going to slash them. Then what does he do when they asked him to come back to the store after they caught up to the guy? He won't cooperate. They have to put handcuffs on him and take him back to the store. Only at that point does he realize that their desire to be good employees and follow the law is stronger than his desire to disobey the law.

"We're in [a] similar situation here as jurors. You are sitting as judges. Is your will to follow the law stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills like the employees could have blown it . . . off. It is kind of a test. He is pushing it to the limit. Maybe if I take it

(31)

this far, maybe people out there won't think at this time is important [*sic*] and they won't vote guilty.

"But it is important he is testing will the law be enforced? [*sic*] Will my lawlessness be tolerated by the society. And the answer to that question must be no, and the answer to the question of guilt in this case must be yes."

Defense counsel objected to the last portion of the prosecutor's argument. Defense counsel stated that the arguments concerning analogies to traffic tickets were objectionable but he did not object at that point in the argument because he thought that the prosecutor would move on. However, once the prosecutor returned to those remarks, defense counsel objected and stated that the prosecutor was improperly commenting on the exercise of defendant's constitutional right to a jury trial and that striking the statements and admonishing the jury would not cure the prejudice. The Attorney General asserts that defendant may not object to the first portion of the argument on appeal because defense counsel did not object at the time; however, defense counsel's objection did encompass the prior comments, and defense counsel explained that he did not think that striking the comments and admonishing the jury would cure the harm. Therefore, defendant did not waive this particular portion of the issue on appeal.

A defendant has a constitutional right to a trial by jury under both the federal and state Constitutions. (*People* v. *Trejo* (1990) 217 Cal.App.3d 1026, 1029.) A prosecutor may not make adverse comments on a defendant's exercise of a constitutional right. (Cf.

Griffin v. *California* (1965) 380 U.S. 609, 613 [85 S.Ct. 1229, 14 L.Ed.2d 106]; *People* v. *Crandell* (1988) 46 Cal.3d 833, 877-878.)

Although the prosecutor's comments were an improper comment on defendant's exercise of his right to a trial by jury, the trial court admonished the jury. "All right, ladies and gentlemen, before we have the defense counsel's closing argument I just want to make sure that nobody is led astray. There was a reference, actually the last paragraph of the argument was we're in [a] similar situation as jurors. You're sitting as judges. Is your will to follow the law stronger than Mr. Riggs' will to disobey the law, or are you going to blow it off and say, you know, it is just a $20 bottle of pills, like employees could have blown it off.

"If any of the jurors interpreted the following, anything after that, as meaning that the defendant should not or does not have a right to go to trial, period, that reference should not have been, I believe, it wasn't intended to mean that the defendant does not have a right to go to trial. But you are not to interpret that he did not have a right to go to trial, or the fact that he went to trial is any evidence of his guilt. As I say I don't think it was intended that way, but just if reading it I just want to make sure that you didn't take it that way. Okay, counsel, you may proceed."

The trial court's prompt admonishment informed the jury that defendant had a constitutional right to trial by jury and that the jury was not to consider that fact in any way in determining whether defendant was guilty of the offenses. This admonishment adequately corrected any harm created by the prosecutor's statements. (*People* v. *Gionis*

(1995) 9 Cal.4th 1196, 1217.) In fact, after the verdicts were returned, a juror questioned why such a small case went to jury trial, but reaffirmed that he understood that defendant had a constitutional right to a jury trial. The error was harmless beyond a reasonable doubt.

II

Cruel and Unusual Punishment

Defendant contends that his sentence of 25 years to life was cruel and unusual punishment under both the federal and state Constitutions because the sentence is disproportionate to the offense. The Attorney General contends that defendant waived this issue because he did not bring a motion on these grounds. However, defendant did ask the court to exercise its discretion to dismiss or strike the priors under several grounds including the proportionality of the sentence, although defendant did not use the term, "cruel and unusual punishment."

The Eight Amendment to the United States Constitution prohibits cruel and unusual punishment which includes sentences that are disproportionate to the crime committed. (*Solem* v. *Helm* (1983) 463 U.S. 277, 284, 287 [103 S.Ct. 3001, 77 L.Ed.2d 637].) In determining whether a sentence is proportionate under the federal Constitution, we examine the gravity of the offense and the harshness of the penalty, compare the sentences imposed on other criminals in the same jurisdiction and compare the sentences imposed for commission of the same crime in other jurisdictions. (*Id.* at pp. 290-291.) In

applying this test, we grant substantial deference to the authority that the Legislature possesses in determining punishment for crimes. (*Id.* at p. 290.)

As for the first prong, defendant contends that his sentence of 25 years to life is too harsh a penalty for the theft of a bottle of vitamins worth approximately $20. We agree with this statement; however, defendant received his punishment for his recidivism and not just his current offense. (*People* v. *Cooper* (1996) 43 Cal.App.4th 815, 825.)

The Legislature has designated the term of 25 years to life for a recidivist who has received two or more prior serious or violent felony convictions and who receives a subsequent felony conviction. In punishing recidivists, the government is interested in more than punishment for the current offense. The state has an interest in dealing more harshly with those who commit repeated criminal acts thereby showing that they are incapable of conforming to society's norms. (*Rummel* v. *Estelle* (1980) 445 U.S. 263, 276 [100 S.Ct. 1133, 63 L.Ed.2d 382].) "The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the

necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Id.* at pp. 284-285.)

Defendant compares his crime with "more serious crimes" in California. He refers to the sentence of 26 years to life for a first degree murder conviction with use of a deadly weapon with parole eligibility in 17 years and 4 months. Defendant will be serving 25 years to life with parole eligibility in approximately 20 years. Defendant argues that he does not pose a greater danger to society than a first degree murderer does. A comparison of defendant's punishment for his recidivism to the punishment for others who have been committed for "more serious crimes" but who are not repeat felons does not aid our discussion. (*People* v. *Ayon* (1996) 46 Cal.App.4th 385, 400.) We note that defendant's prior strike convictions were for serious and/or violent felonies. Although defendant's current conviction is not for a violent felony, a state's interest in deterring criminal conduct is not always determined by the presence or absence of violence. (*People* v. *Cooper, supra*, 43 Cal.App.4th at p. 826.)

Defendant next compares his sentences with the recidivist statues in other jurisdictions. He notes that in some jurisdictions the current felony must be an aggravated one, some states apply varying punishment depending upon the severity of the current crime, other states require the service of prior prison terms for the prior felonies or require more prior felony convictions, other states allow the court wider jurisdiction in the application of their recidivist statutes, some states give the prosecution more

* NOTE: ACCORDING TO PPL. V STOFLE 45 CAL. APP. 4TH 417, A 3 STRIKE DEFENDANT MUST NOW SERVE A "MINIMUM" OF 25 YEARS, BEFORE PAROLE BOARD ELIGIBILITY REVIEW!9 (EXHIBIT "B").

discretion and some states allow wash-out periods for prior felony convictions. Our review of the recidivist statutes in other jurisdictions indicates that at least 40 states have some form of punishment for recidivists.[2] It appears that California's three strikes law is part of a nationwide pattern of recidivist statutes calling for substantially increased sentences for repeat offenders. The fact that a sentence is mandatory does not necessarily render it cruel and unusual. (*Harmelin* v. *Michigan* (1991) 501 U.S. 957, 994-995 [111 S.Ct. 2680, 175 L.Ed.2d 836.].) Although there may be some minor differences in the recidivist statutes, California's statute does not appear to be substantially more

---

2 Recidivist statutes are currently in effect in at least Alabama (Ala. Code, § 13A-5-9), Arizona (Ariz. Rev. Stat. Ann., § 13-604), Arkansas (Ark. Code Ann., § 5-4-501), Colorado (Colo. Rev. Stat., § 16-13-101), Connecticut (Conn. Gen. Stat. Ann., § 53a-40), Delaware (Del. Code Ann., tit. 11, § 4214), Florida (Fla. Stat. Ann., § 775.084), Georgia (Ga. Code Ann., § 17-10-7), Hawaii (Haw. Rev. Stat., § 706-606.5), Idaho (Idaho Code, § 19-2514), Illinois (Ill. Ann. Stat., ch. 720, § 33B-1), Indiana (Ind. Code, § 35-50-2-8.5), Kansas (Kan. Stat. Ann., § 21-4504), Kentucky (Ky. Rev. Stat. Ann., § 532.080), Louisiana (La. Rev. Stat. Ann., § 15:529.1), Maryland (Md. Ann. Code, art. 27, § 643B), Michigan (Mich. Comp. Laws Ann., § 769.12), Mississippi (Miss. Code Ann., § 99-19-83), Missouri (Mo. Ann. Stat., § 558.016), Montana (Mont. Code Ann., § 46-18-501), Nebraska (Neb. Rev. Stat., § 29-2221), Nevada (Nev. Rev. Stat., § 207.010), New Hampshire (N.H. Stat. Ann., § 651:6), New Jersey (N.J. Stat. Ann., §§ 2C:44-3, 2C:43-7), New York (N.Y. Penal Law, § 70.08), North Carolina (N.C. Gen. Stat. §§ 14-7.1, 14-7.6), North Dakota (N.D. Cent. Code, § 12.1-32-09), Oklahoma (Okla. Stat., tit. 21, § 51), Oregon (Ore. Rev. Stat., § 161.725), Rhode Island (R.I. Gen. Laws, § 12-19-21), South Carolina (S.C. Code Ann., § 17-25-45), South Dakota (S.D. Codified Laws, § 22-7-8), Tennessee (Tenn. Code Ann., §§ 40-35-106, 40-35-107, 40-35-108), Texas (Tex. Penal Code Ann., § 12.42), Utah (Utah Code, § 76-8-1001), Vermont (Vt. Stat. Ann., tit. 13, § 11), Virginia (Va. Code Ann., § 19.2-297.1), Washington (Wash. Rev. Code Ann., § 9.92.090), West Virginia (W. Va. Code, § 61-11-18) and Wyoming (Wyo. Stat., § 6-10-201).

burdensome than others. Thus, defendant has not met his burden with respect to the third prong.

California's provision regarding cruel and unusual punishment is found in the California Constitution under article I, section 17. The prohibition against cruel and unusual punishment in California is violated if the sentence is grossly disproportionate to the offense for which it is imposed. We examine the nature of the offense and the offender with regard to the degree of danger they present to society, compare the penalty in this case with other penalties in California for more serious crimes and compare the penalty for this same offense in different jurisdictions with the one imposed in this case. (*People* v. *Dillon* (1983) 34 Cal.3d 441, 477-478; *In re Lynch* (1972) 8 Cal.3d 410, 426-427.) Defendant has the burden of establishing that his punishment is greater than that imposed for more serious offenses in California and that similar offenses in other states do not carry punishments as severe. (*People* v. *Ayon*, *supra*, 46 Cal.App.4th at p. 399.)

"First, the crime itself must be reviewed, both in the abstract and in view of the totality of the circumstances surrounding its commission, 'including such factors as its motive, the way it was committed, the extent of defendant's involvement, and the consequences of his acts . . . ,' to determine whether a particular punishment is grossly disproportionate to the crime for which it is inflicted. [Citations.] Secondly, the court must consider 'the nature of the offender' and inquire 'whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his

age, prior criminality, personal characteristics, and state of mind.' [Citations.]" (*People* v. *Weddle* (1991) 1 Cal.App.4th 1190, 1197-1198, fns. omitted.)

As previously discussed, defendant is being punished for his recidivism, and the state has a great interest in punishing criminals for recidivist behavior. Although his current offense is not violent, society's interest is not always determined by the violence of the offense. (*People* v. *Cooper*, *supra*, 43 Cal.App.4th at p. 826.) As for his current offense, it was a petty theft motivated by homelessness and hunger; however, he did threaten violence to store employees. Defendant was in his mid-40's at the time he committed the current offense. Defendant has a lengthy list of prior convictions including four counts of second degree robbery and a vehicle theft. Since 1983, defendant has spent the majority of his life in custody. Defendant does appear to have a problem with substance abuse. His substance abuse was apparently precipitated by the death of his young son.

By committing another felony after having been convicted of numerous prior serious and/or violent felonies, defendant has proven that he cannot conform to society's rules. Prior incarceration has failed to dissuade defendant from his criminal activities. Our discussion of the last two prongs under the federal Constitution applies equally to the California Constitution. We therefore determine that defendant's punishment for his recidivist behavior was not grossly disproportionate to the offense and his sentence under the three strikes law does not constitute cruel and unusual punishment under the California or federal Constitutions.

III

Presentence Custody Conduct Credit

The court limited the presentence conduct credits given to defendant on the basis of section 2933.1. That section limits presentence conduct credit to 15% for people convicted of certain violent felonies which are listed in section 667.5. Subdivision (c)(7) of section 667.5 lists "any felony punishable by death or imprisonment in the state prison for life" as a violent felony. The court below determined that defendant's sentence of 25 years to life qualified him for application of section 2933.1. The Attorney General concedes that defendant is entitled to additional conduct credits; however, the Attorney General cites to an incorrect case in support of this concession. In *People* v. *Henson* (1997) 57 Cal.App.4th 1380, this court held that the sentence of 25 years to life imposed upon a defendant under the three strikes law does not qualify as "any felony punishable by death or imprisonment in the state prison for life" as defined in section 667.5, subdivision (c)(7). Therefore, this court held that section 2933.1's limitations on presentence conduct credit does not apply to a person's sentence under the three strikes law unless that person's current conviction is for one of the listed violent felonies. Defendant's current offense is for petty theft with a prior which is not one of the listed violent felonies; therefore, the court erred in applying section 2933.1 to defendant. Both defendant and the Attorney General agree that he is entitled to a total of 204 days of conduct credits rather than the 61 days which the court awarded to him.

DISPOSITION

The judgment is affirmed; however, the trial court is ordered to amend the abstract of judgment to award defendant a total of 204 days of presentence conduct credit and to forward a copy of the amended abstract of judgment to the Department of Corrections.

NOT FOR PUBLICATION

/s/ Ramirez
P. J.

We concur:

/s/ Ward
J.

/s/ Gaut
J.

NOTED
NOV 19 1996
COMPLEX :
ASSOCIATE WARDEN

11-17-97
Department of Corrections

97 NOV 17 PM 2:36

State of California

Memorandum

Date : November 14, 1997

To : Wardens
Classification & Parole Representatives
Correctional Case Records Managers

INSTRUCTIONAL

Subject: CONDUCT CREDIT FOR INMATES COMMITTED TO AN INDETERMINATE TERM AS A THIRD STRIKE OFFENDER (*PEOPLE VS. STOFLE*) (CR 97/36)

The purpose of this memorandum is to provide updated instructions regarding conduct credit for third strike offenders.

PEOPLE VS. STOFLE (1996) 45 CAL. APP. 4TH 417

The Court of Appeal has determined that **inmates committed to an indeterminate term as a third strike offender are not entitled to earn any credit to reduce their minimum term.** Therefore, the following procedures are to be implemented immediately:

- The zero credit rule applies exclusively to third strike commitments ordered pursuant to Penal Code (PC) Section 667(e)(2)(A)(i), (ii) or (iii) or PC Section 1170.12(c)(2)(A)(i), (ii) or (iii).

- Zero conduct credit is effective the date of sentencing.

- All inmates presently in the custody of the California Department of Corrections (CDC), as well as future inmates committed as third strike offenders shall have their Minimum Eligible Parole Date (MEPD) recalculated to reflect zero credit earning status. In order to produce an automated Legal Status Summary, the credit code for the offense data contained in the Offender Based Information System (OBIS) shall be changed to "35."

- Enhancements imposed in connection with a third strike offense shall be reduced by not more than 20 percent (nonviolent offenses), or 15 percent (violent offenses occurring on or after September 21, 1994). The credit code entry in OBIS for the offense and case enhancements would be either "3" (20 percent credit), or "6" (15 percent credit).

- Second strike or nonstrike prison commitments ordered to run consecutively or concurrently with a third strike commitment are not subject to the zero

(EXHIBIT "B")

credit rule. The inmate is eligible to earn applicable credits to reduce the term imposed (i.e., nonviolent second strike would earn 20 percent credit; nonviolent nonstrike would earn work incentive credit; violent offenders for crimes that occurred on or after September 21, 1994 would earn 15 percent credit).

- The provisions of PC Section 2933.5 take precedence over any other credit eligibility law.

- The attached notice has been prepared to advise inmates and parolees of the impact of the *Stofle decision* on third strike offenders. Please ensure that the notice is posted in conspicuous locations accessible to inmates and parolees.

A listing of third strike offenders housed at your institution is provided to assist in identifying all third strike cases which require recalculation. At the time of recalculation, the Case Records Specialist shall post the CDC Form 112 as follows: "MEPD recalculated per *People vs. Stofle*." A Legal Status Summary reflecting the recalculated MEPD shall be forwarded to the inmate along with a copy of the notice regarding *People vs. Stofle*.

Please share the content of this memorandum with all concerned. Any questions may be directed to Kris Hubbard, Correctional Case Records Administrator, at (916) 323-7401 or CALNET 473-7401.

JUDITH L. METZ, Chief
Correctional Case Records Services

Attachment

cc: Regional Administrators

(EXHIBIT "B")